SEP 11 1945
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 359.

STOCKHOLDERS' COMMITTEE OF THE UNIVERSAL LUBRICATING SYSTEMS, INC., Petitioner,

v.

AUSTIN L. STALEY, Trustee in Reorganization for the Universal Lubricating Systems, Inc.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR AUSTIN L. STALEY, TRUSTEE IN REORGANIZATION FOR THE UNIVERSAL LUBRICATING SYSTEMS, INC., IN OPPOSITION.

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Opinion Below.

The Opinion of the Circuit Court of Appeals for the Third Circuit has not been reported as yet; the District Court Opinion is reported at 59 Fed. Supp. 171.

Jurisdiction.

Petitioners apparently are proceeding under Section 347 of Title 28, U. S. Code.

Question Presented.

1. Is the amended Reorganization Plan of the Trustee for the Universal Lubricating Systems, Inc., fair, equitable and feasible, and such as should be approved?*

Statute Involved.

U. S. C., Title 11, Sec. 574.

Statement.

We regret to say that the summary statement** of the matters involved as set forth in the petition (page 2 *et seq.*) contains so many errors of fact as to make it necessary that we hereby file our own statement thereof.

In this case, on June 27, 1945, the Circuit Court of Appeals for the Third Circuit, following appeal of the petitioner here (appellant in that Court) entered an Order affirming the Order of the District Court of the United States for the Western District of Pennsylvania which approved the Trustee's amended Plan of Reorganization for the Debtor company, as fair, equitable and feasible under U. S. C., Title 11, Sec. 574; it is that Order of the Circuit Court of Appeals for the Third Circuit, apparently, that the Petitioner herein hereby now is attempting to have reviewed in the Supreme Court.

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* U. S. C., Title 11, Section 574.

** In general the facts were found against the contentions of petitioner-committee, by the Special Master (pages 19R *et seq.*). Thereafter the petitioner-committee was driven to citing its own contentions as to what the facts were and to ignoring, generally, those Findings.

Other material facts are, as follows:

Universal Lubricating Systems, Inc., debtor herein, has been engaged in the manufacture of lubricating devices since 1932, its place of business being in Oakmont Borough, Pennsylvania. That Borough is a suburb of Pittsburgh. The debtor company lost money in every year except one from 1932 to 1941.* In 1941, its plant was in the hands of the Sheriff by reason of a writ of execution issued by a creditor, and thereupon a bankruptcy petition was filed against it, resulting in an adjudication in bankruptcy in this proceeding; that bankruptcy proceeding subsequently was translated by debtor's petition into a reorganization proceeding under Section X of the Bankruptcy Act (see discussion in Special Master's Report on Plan, page 50R, also, First Finding of Fact, 19R *et seq.*). Austin L. Staley has been and is its Trustee in said proceeding, and is the respondent herein.

In the reorganization proceeding, the Trustee has had considerable business success and has accumulated some cash, and has kept all of his current obligations paid, after, however, many troubles during the first few months of his operation (testimony page 114R, Supplemental Report of Special Master, 66R *et seq.*).

In the language of counsel for the petitioner-committee, the Trustee "has done a wonderful job"** (102R, fifth line from bottom).

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* 27R.

** During the war years, approximately two-thirds of the business of the Trustee has been the manufacturing of munitions for the National War effort; for instance, in 1943, the Trustee did about $225,000.00 worth of industrial business, and $497,000.00 worth of Government business. See 28R.

In the proceeding, on April 17, 1944, the Trustee filed a Plan of Reorganization of the debtor company, which was referred to Watson B. Adair, Referee in Bankruptcy, as Special Master to hold hearings under Sections 169 and 174 of the Bankruptcy Act, U.S.C.A. Title 11, Sections 569, 574. To this Plan, the Trustee later proposed amendments, which were likewise referred to the Special Master for hearing and report.

That Plan was fought by the petitioner-committee (18R) and after the Special Master had filed a report refusing approval of the Plan because he believed there could be no provision for stockholders (55R), the Trustee then, on September 18, 1944, filed an Amended Plan, copy of which has been attached to the record in the Circuit Court of Appeals and the main provisions of which are, as follows:

(1) That creditors of debtor shall be given one share of preferred stock, and one share of common stock in the reorganized corporation for each $100.00 of claims duly proven by them;

(2) The present common stockholders shall be given one share of the new common stock, upon paying $10.00 for each unit of ten shares of the old common stock;

(3) The present preferred stockholders shall be given one share of common stock upon paying $10.00 for each share of old preferred stock;

(4) That each share of preferred stock in the new corporation is to have ten votes, while each share of the new common stock shall have one vote;

(5) That the Stewart-Warner litigation shall not be passed to the reorganized corporation, but shall be retained and litigated by the Trustee, and

that the net proceeds of the litigation shall be earmarked for retirement of the new preferred stock.

Certain clerical amendments subsequently were made to the Plan, and, after further objections by the Committee, the District Judge filed his Opinion (13R) and entered an Approval Order (132R), which is dated March 12, 1945. By that Order, the District Judge affirmed the finding of insolvency and affirmed the findings and conclusions of the Special Master, with one exception; that one exception was that he directed that paragraph IX(c) of the Plan (12R) be deleted, and in lieu thereof that the Trustee substitute a new IX(c). That new sub-paragraph appears at page 18 of the Plan, joined to the end of the Circuit Court of Appeals Record. The effect of this substitution and change in the Plan, in substance, was that whereas the excess, if any, of the proceeds of the Stewart-Warner litigation after the payment of debts (the debts being represented in the reorganized company by new preferred stock) under the original* form of the Plan would go to the reorganized company, under the change and substitution, that excess will now go to the present stockholders of debtor. From said Order of Approval, of the District Judge, the appeal was then taken to the Circuit Court of Appeals for the Third Circuit by this Committee.**

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* 12R.

** Certain creditor interests also appealed from said Order on the ground that no provision for stockholders should have been made, and that appeal likewise was unsuccessful (see Opinion of the Circuit Court of Appeals), said creditors' appeal and the appeal of the petitioner having been covered by the said Circuit Court Opinion.

It is difficult for us to follow the summary statement contained in the petition for the reason that, generally, no page references are furnished—frequently that is because no page reference could be furnished by petitioner, in the circumstances; some of the facts set forth in that statement of petitioner are purely imaginary, or otherwise are completely outside of the record.

For example, there is not the faintest possibility of excuse for the statement "Brynoldt's entire claim was for $23,500.00," appearing at page 5 of the petition. It is true that he asserted the one claim for approximately that amount, but his other claims are set forth in close detail in this record,* and we can only believe that the petitioner in the sentence above quoted has been guilty of a deliberate misstatement of fact. The testimony with regard to Brynoldt's claims has not been printed or made a matter of record in the Circuit. No one ever requested that it be printed; the Order of the Circuit Court of Appeals, being the Order of April 19, 1945, with regard to the printing was as follows: (Page 1R)

> "AND NOW, to wit, this 19th day of April, 1945, upon the motion of A. E. Kountz, Esquire, attorney for Austin L. Staley, Trustee in Reorganization for Universal Lubricating Systems, Inc., and upon the stipulation of counsel for both the appellant and the appellee, it is
>
> ORDERED, that the argument in the above entitled cause be heard in the week of May 14, 1945, and, it is
>
> FURTHER ORDERED, that the parties may print in their appendix or appendices only the following

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* 21R *et seq.;* see Paragraph VI of Supplemental Report, 74R.

portions of the record in the court below: (1) the opinion of the court; (2) the plan of reorganization; (3) the Master's Report and (4) all testimony and exhibits relating to the chose in action asserted against Stewart-Warner Corporation.

FOR THE COURT,
BIGGS,
U. S. Circuit Judge."

Nor have the Order of the District Court directing the allowance and classification of claims (including the Brynoldt claim), nor the July 26, 1945, Order of Court (mentioned at page 13 of this brief, footnote), been made part of the Record in the Circuit Court of Appeals.

The Special Master has found that Brynoldt's claims amount to $71,011.35 (23R). No one has challenged those claims by testimony or otherwise controverted them in my intelligent way.

The Special Master, in findings 25, 26, 27 and 28 in his Report on the Plan, 24R, et seq., has set forth in close detail the nature of Brynoldt's securities; the Special Master has approved the provisions for Brynoldt in the Plan (see paragraph VI of the Special Master's Supplemental Report on the Plan, 74R). The Special Master's Report thereon has been approved and affirmed in the District Court and in the Circuit Court of Appeals.*

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* In our argument, we will also state that this present contention of petitioner's regarding Brynoldt's claim is moot and senseless (Page 13 *et seq.*)

Argument.

We do not pretend to be able to following the argument contained in the petitioner's brief.

One difficulty, of course, is that the facts sometimes are not as petitioner alleges them to be. The facts were found carefully and in detail by the Special Master (19R *et seq.*), and those findings were approved in the District Court and in the Circuit Court of Appeals.* Petitioner, in his brief, appears to desire to make but few references to those findings.**

I.

Petitioner's first argument is that the property of the debtor should have been valued on the basis of late earnings. The Circuit Court of Appeals, in its Opinion,

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* The opinion of the Circuit Court of Appeals will appear, we understand, at the back portion of the record, as filed in the Supreme Court by petitioner; but there has been an error on the part of petitioner's printer, apparently, as to the page number, so we are not undertaking to cite it by page number.

** An example of the garbled manner which the petition and brief of petitioner states the subjects is on page 18 of petitioner's brief. There, by the careless use of quotation marks, it is made to appear that the Trustee's Plan alleges a valuation of $2,000,000.00 for the Stewart-Warner law suit. Other gross errors to be found in the petition are—at page 3 thereof, a statement which the Trustee made with regard to Brynoldt's title to certain machinery and the weakness thereof has been tortured so as to imply that the Trustee believes that Brynoldt's title to the coupler patent is weak—quite a different subject. The statement "Brynoldt's entire claim was for $23,500.00", appearing at page 5 of the petition, of course, is a gross misstatement, as we have set forth more fully at page 6 and page 7 of this brief.

succinctly disposed of that argument on the part of the petitioner by the following:

"It is also made the subject of complaint that the valuation was not fixed by capitalization of earnings of the debtor. The debtor corporation has been in business since 1932 and up to 1941 lost money in every year but one. During management by the Trustee there was a profit in 1941, a loss in 1942 and large profits in 1943 and the first five months of 1944.

As to the years prior to the trusteeship, the special master stated that the losses may have been due to litigation with Stewart-Warner, though he did not so find as a fact. During the war years a portion of the business has been the manufacturing of goods for the national war effort for both Army and Navy. For instance, in 1943 the trustee did about $225,000 worth of industrial business and $497,000 Government business.* Due to a back log of losses which could be carried over, there was no Federal income tax payable in 1943. We heard a great deal of argument about good prospects for the business. The Court was told that with the installation of more modern machinery the productive capacity of a given machine would be increased; that as new machinery was added further increased production would be continuously possible. All of this may well be true and we hope, for the sake of those engaged in the enterprise, that it proves to be true. It bears upon the question of the feasibility of any plan which contemplates the continuance of the debtor as a going business concern. But such

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* See report of Special Master page, 28R *et seq.*

prospects do not furnish an argument for capitalization of earnings to show present worth when the earnings have come under the highly artificial stimulus of war production and an unusually favorable tax situation."*

(The comments in the first footnote here are our own.)

II.

With regard to the valuation of the Stewart-Warner lawsuit, we say—the Special Master, in his report (30R *et seq.*) sets forth the facts with reference to that pending law suit; and at page 48R of his report, the Special Master discusses in detail the rules of law with reference to evaluating a claim of that nature; we respectfully refer thereto. The opinion of the Circuit Court of Appeals also succinctly states this subject in that portion of its opinion which is set forth now in the footnote.**

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* A losing business generally is valued on a liquidating basis. See 29 *Columbia Law Review,* 582, 597, 598, *Mitchell v. Investment Securities Corp.* (5th Cir.) 67 F. 2d 669, *In re Fred D. Jones Company,* 268 Fed. 818 (7th Cir.). The liquidating value of debtor's physical assets (omitting a piece of land at Springdale which the Trustee sold for several thousand dollars and which is valued by the special master at $5,250) was $39,192.35 (see Special Master's report 25 a *et seq.*); the indebtedness of debtor is in excess of $400,000 (23 a).

** "The point most stressed by the appellants throughout their brief and oral argument has to do with a valuation for a claim against Stewart-Warner Company. The debtor makes lubricating apparatus and is a competitor of Stewart-Warner. It is stated that the debtor prevailed in certain patent litigation against that company. In October 1937 Stewart-Warner sued the debtor for the alleged infringement of certain patents. Debtor in November 1937 counter-claimed for damages for unfair competition and the counter-claim as amended in April

We feel that those references are ample.

The novelty of the petitioner's contention with regard to the valuation of said pending law suit is set forth clearly by the statement of the counsel for petitioner, before the special master, as follows: (79R)

"I don't say the full amount is less or more but I do say if he says he can prove liability it is exactly the same as having liability established."

1941 has been held to state a cause of action. 42 Fed. Supp 140 (1941). It is the failure to give a valuation to this claim against Stewart-Warner, as part of present value of the debtor, which is the shareholders' chief ground for complaint. The claim has not been ignored in the proposed rearrangements; the plan provides that the net proceeds of whatever is recovered in this lawsuit shall be used for the retirement of the new preferred stock, with any balance remaining to be distributed among the present preferred and common shares as a liquidating dividend.

The appellants say this claim should be valued for at least $750,000. They point to testimony from the attorney-at-law retained in the lawsuit against Stewart-Warner, that he estimated the damages suffered by the debtor from unfair competition at $2,000,000, that he expected to prove liability "up to the hilt". Then it is pointed out that equity will not suffer a wrong to be without a remedy, and, therefore, the presumption is that the full amount of loss will be recovered. Since, under the statute, damages are to be trebled, the $6,000,000 thus to be recovered will quite change the financial picture of the debtor.

We fear that the stockholders' committee has allowed itself to become overoptimistic in this argument. We have not, of course, the faintest notion of the strength of the debtor's case nor the defendant's de-

With the present stockholders of debtor thus obtaining under this Plan of the Trustee the full residue of the proceeds of the said litigation (if there should be proceeds) after the payment of expenses thereof and after the retirement of the debts of the debtor, it is difficult to find any moral or legal excuse for their attempts to fight the Plan.* The Special Master has set forth in detail the practical reasons why there must be an early reorganization, if there is to be any substantial hope for the commercial success of the reorganized debtor. (See Report of Special Master paragraphs 31, 32 and 33 page 38R *et seq.* and see supplemental report of Special Master at paragraph 9, 65R). At page 70R, the Special Master has found that "the prospects of successful operation of the business would be adversely affected by the prolongation of the trusteeship."

The Opinion of the Circuit Court of Appeals concurs in that finding, the language being "that the prospect of successful operation of the business would be adversely affected by prolongation of the trusteeship * * *" That finding of fact nowhere has been attacked, and could not be attacked.

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fense in the forthcoming litigation. The suit has not yet been tried and is still in the preliminary stage. Lawsuits, even those in which a plaintiff endeavors to prove liability up to the hilt, are uncertain things both as to the time which they take and what the end product to the litigant will be. We think there was no error in not including this claim in the evaluation of the debtor's property and that the provision made for the distribution of eventual net proceeds is both fair and feasible. We have examined the decisions cited to us. *The Committee for Holders, etc. v. Kent,* 143 F. (2d) 684 (C. C. A. 4, 1944). We do not find that the facts of that case give us any help in this one."

* See Paragraph IX c, Page 18 of the Plan.

III.

Petitioner's argument with regard to Brynoldt's $35,000.00 is senseless; that is so because of several details and circumstances.

As we believe that both the petitioner-committee and the Trustee-respondent properly could be criticized if they failed to inform this Court thereof, we respectfully call to the Court's attention that after the Circuit decision in the case at bar (exactly on July 26, 1945) the District Judge entered an Order* the effect

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* Following an application therefor and against the oral objections of counsel for petitioner herein, District Judge Gibson on July 26, 1945, in this proceeding, entered an Order directing payment, forthwith, and in advance of confirmation of the Plan, of certain secured and priority claims which had been unpaid for more than four years and which were clamoring for payment, and including the $35,000.00 Brynoldt item. The petitioner herein, by counsel, on July 30, 1945, notified the Trustee, respondent herein, that petitioner would take an appeal from the aforesaid Order, the notice being by letter in the following form:

"William C. McClure
Joseph M. McClure
Attorneys at Law
Pittsburgh, Pa.
7th Floor Jones Law Building
July 30, 1945

Kountz, Fry, Staley & Meyer
Attorneys at Law
544 Union Trust Building
Pittsburgh, Pa.

IN RE: Order of Judge Gibson, made July 26, 1945

Dear Sirs:

You are hereby notified that the Stockholders' Committee intends to appeal from that portion of the Order of Judge Gibson, made July 26, 1945, to-wit:

of which makes moot and academic the $35,000.00 Brynoldt subject.

However, we cannot refrain from commenting briefly on certain portions of petitioner's argument with regard to Brynoldt's claim. His claim, or claims, altogether amount to $71,011.35. See Page 23R *et seq.*, and Page 33R *et seq.* His securities are numerous mortgages and judgments on the real estate of the debtor, the title to the coupler patent, etc. The Special Master in paragraphs 26, 27 and 28 of his report on the Plan (35R *et seq.*) has set forth in close detail the nature of Brynoldt's securities; the Special Master, after reviewing the subject of the Brynoldt claim, has approved the Brynoldt cash compromise allowance at $35,000.00 (see page 74R,

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Subsection (b) of paragraph 1:

'To Christian Brynoldt, a secured and judgment creditor, in accordance with the provisions of paragraph 7(b) of said petition, the Trustee shall pay $35,000.00;'

You are, therefore, directed to withhold payment to Brynoldt pending the Appeal to the Circuit Court of Appeals of the U. S.

Very truly yours,
(s) W. C. McCLURE
of Attorneys
for Stockholders Committee"

WCM:bg

However, and notwithstanding the aforesaid letter, no such appeal was taken, and the time prescribed by law for such appeals has expired (Section 25 of the Bankruptcy Act as amended U.S.C. Title 11, Section 48.). Therefore, and in obedience to the aforesaid Order of Court the Trustee, respondent, at the time of the preparation of this brief, is now in the process of making payment to the said lien and priority claimants, including Brynoldt. A certified copy of said July 26, 1945, Order is attached to this Brief at the end thereof, with certificate showing also that no appeal therefrom has been filed.

paragraph VI of the supplemental report of the Special Master.)

The aforesaid approval by the Special Master of the Brynoldt allowance was not disturbed by the District Judge or by the Circuit. No creditor interest opposed it at any time.* Whether or not, under the facts that compromise allowance as to Brynoldt was a fair and reasonable one is a question of fact rather than of law. It is the policy of the Bankruptcy Court in reorganization cases to permit compromises at any stage of the proceeding, after notice, where justified. (See *Consolidated Rock Products Co. v. DuBois,* 312 U.S. 510, at page 563, *Drexel v. Loomis,* 8th Cir., 1929 35 Fed. 2nd 800, and the various bankruptcy and other cases cited or referred to in *Gordon v. H. S. Co.,* 319 Pa. 174, at page 179.)

Conclusion.

The Trustee, respondent, believes that it would be impossible for him within the confines of a simple brief to dwell upon the various errors and inconsistencies which are contained in the petition and brief of the petitioner; therefore, he will limit himself to the major items hereinabove set forth, and he respectfully submits that the petition is without merit in fact or in law and should be denied.

A. E. KOUNTZ, ESQ.,
CLARENCE A. FRY, ESQ.,
Attorneys for Austin L. Staley, Trustee for Universal Lubricating Systems, Inc., Debtor.

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* 74R Par. VI.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Matter of
UNIVERSAL LUBRICATING SYSTEMS, INC.,
Debtor.

No. 21104 In Proceedings for Reorganization of a Corporation Under Chapter X of the Bankruptcy Act.

Order Upon the 10th Day of July, 1945, Petition for Order of Confirmation and Other Relief.

Filed July 26, 1945.

AND NOW, the 26th day of July, 1945, upon consideration of the Trustee's Petition filed the 10th day of July, 1945, praying for an Order of Confirmation of the Plan of Reorganization and for other relief, and which petition has come on for hearing this day, following ten (10) days' notice, by mail, to creditors and stockholders, as will more fully appear by affidavit of mailing filed the 24th day of July, 1945, and pursuant, also, to actual notice given to counsel for various parties in interest, as will more fully appear by affidavit thereof filed the 13th day of July, 1945, and it appearing to the Court that the Debtor has been decreed insolvent, and that the Trustee's Plan of Reorganization has been approved by a Judge of this Court and by the Circuit Court of Appeals for the Third Circuit, and testimony having been taken today which shows the acceptance of the Plan by the requisite amount of the general or unsecured creditors, they being the only class affected by the Plan, upon motion of A. E. Kountz, Attorney for Austin L. Staley, Trustee in Reorganization for the Universal Lubricating Systems, Inc., Debtor, IT IS ORDERED;

1. In accordance with sub-paragraph (c) of the Prayer of said petition, and in advance of the confirmation of the Plan, the Trustee is directed forthwith to pay certain secured claims and priority claims, upon surrender or satisfaction of the several items of security held by the secured creditors, respectively, as follows:

(a) To Clark and Doolittle, a secured and judgment creditor, in accordance with paragraph 7 (a) of said petition, the Trustee shall pay $5,680.29, plus interest, computed from the date of judgment to the date of payment;

(b) To Christian Brynoldt, a secured and judgment creditor, in accordance with the provisions of paragraph 7 (b) of said petition, the Trustee shall pay $35,000.00;

(c) To the Collector of Internal Revenue, as an anticipated and advance payment of the item of $10,000.00, which is payable upon confirmation of the Plan, in accordance with Exhibit "K" attached to the Plan of Reorganization, the Trustee forthwith shall make payment of $10,000.00;

(d) The Trustee shall pay, in cash, in full, or in such reduced amounts as he may be able to arrange through compromise, the Unemployment Compensation claims of the Commonwealth of Pennsylvania mentioned in paragraph 9 of the aforesaid petition.

3. Further hearing on the aforesaid petition filed the 10th day of July, 1945, is hereby continued and adjourned to the 28th day of August, 1945, at 10:00 o'clock A. M.

R. M. GIBSON,
D. J.

Certified from the records
this 7 day of September, 1945.
.....B. H. Berger.....Clerk

September 7, 1945.

I am unable to find from the records that an appeal has been taken in the above entitled case, since the date of the said order.

.....B. H. Berger.....Clerk